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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA
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v.
* 11-cr-06-01-JL
* November 8, 2011
* 2:10 p.m.
BRIAN MAHONEY
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TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Government: Arnold Huftalen, AUSA
U.S. Attorney's Office
53 Pleasant Street
Concord, NH 03301

For the Defendant: Paul Garrity, Esq.
14 Londonderry Road
Londonderry, NH 03053

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603)225-1454

1 (Counsel in chambers with judge.)

2 IN OPEN COURT

3 THE CLERK: The court has before it for
4 consideration this afternoon a status hearing in
5 Criminal Case 11-cr-6-JL, United States of America
6 versus Brian Mahoney.

7 THE COURT: When I came out from chambers, Mr.
8 Mahoney was having a conversation with his lawyer. Did
9 you want to continue that conversation, did you have
10 enough time to talk to your lawyer?

11 THE DEFENDANT: Yeah.

12 THE COURT: Are you okay?

13 THE DEFENDANT: Yup.

14 THE COURT: All right. This hearing deals
15 with a sealed exhibit, and I want to make sure, this is
16 a sealed courtroom right now, Charli?

17 THE CLERK: No, judge.

18 THE COURT: Should it be, counsel? I don't
19 think so, actually, no, I don't think so as long as the
20 document remains sealed. Okay.

21 What we have here, what's been before the
22 court here for a number of hearings are really two
23 primary issues that are preliminary. One is the status
24 of counsel, and the second is the defendant's competency
25 to stand trial and competency to waive his right to the

1 assistance of counsel.

2 Let me ask you today, Mr. Mahoney. Do you
3 still maintain your position that you'd like to, you can
4 remain seated, you can remain seated, do you still
5 maintain the position that you would like to either
6 proceed pro se without counsel? In other words, you
7 don't want the assistance of Attorney Garrity?

8 THE DEFENDANT: Well, I mean, I have him as
9 standby counsel. I think at this particular level,
10 judge, I think I just explained that to Attorney
11 Garrity, that I've been studying these sex offender
12 registry laws since 1999 and of course since they've
13 been looking for me since 2003. That was one of the
14 reasons why I actually moved to New Hampshire 1999, the
15 New Hampshire case which I cited right away, it was
16 cases that I've been familiar with the Megan's Law Act,
17 as well as the, of course I just became familiar with
18 the Adam Walsh Act which I didn't know even existed
19 until November 5, 2010.

20 THE COURT: So if I found that you were
21 competent to waive your right to proceed with counsel,
22 you would like to proceed with Attorney Garrity as
23 standby counsel?

24 THE DEFENDANT: That's correct.

25 THE COURT: Just to advise you. All right.

1 THE DEFENDANT: Yes. We talked that over
2 already about that issue because of the fact that at
3 this point I think we're supposed to get into trial on
4 December 6th if in fact it even goes to that level, I
5 think at this point I'm really ready for trial. Of
6 course I have a few more motions today as well.

7 THE COURT: All right. Now, okay, now I want
8 to make sure about this because it's important. You
9 filed some papers in court alleging misconduct, okay, on
10 the part of Attorney Garrity and myself on a prior case
11 before I was a judge, and that's serious and --

12 THE DEFENDANT: It's serious.

13 THE COURT: And if you have questions about
14 Attorney Garrity's professional competence and his
15 ethics, that is important, even if he's just standby
16 counsel. So, I mean, if you maintain those positions
17 we're going to have, at some point we're going to have
18 to talk about that. Do you understand?

19 THE DEFENDANT: I do.

20 THE COURT: Because if those are things you
21 really believe about Attorney Garrity, that he did that
22 and that I was party to it, you know, it's something we
23 need to resolve before we had a trial, okay. Because
24 afterward, if the trial, frankly, if the trial resulted
25 in your conviction, we wouldn't want to have to do the

1 whole trial over on the grounds that you claim that you
2 had a corrupt judge and an unethical lawyer. Do you
3 understand?

4 THE DEFENDANT: I understand that, that's
5 correct.

6 THE COURT: So, as of today are you
7 maintaining those positions that you have a --

8 THE DEFENDANT: Well, you know, judge, when
9 you get back to citing case law which I --

10 THE COURT: Can you just tell me yes or no if
11 you maintain those positions?

12 THE DEFENDANT: Yes.

13 THE COURT: Okay. All right, so, we will
14 cross those bridges when we come to them.

15 THE DEFENDANT: That's correct.

16 THE COURT: Now, step one, are you competent.
17 Are you competent to participate in a criminal trial,
18 and as a preliminary to that, are you competent to waive
19 your right to the assistance of counsel. So, I have an
20 October 20, 2011 report from Dr. Eric Mart from Highland
21 Psychological Services. Have you had a chance to read
22 that?

23 THE DEFENDANT: I did.

24 THE COURT: Okay.

25 THE DEFENDANT: I did, your Honor.

1 THE COURT: Now, obviously Dr. Mart has opined
2 that you are not competent to stand trial.

3 THE DEFENDANT: That's correct.

4 THE COURT: We have the Bureau of Prisons that
5 said, as you pointed out last hearing, you are competent
6 to stand trial. When I have that, I need to have a
7 formal competency hearing where I actually hear from Dr.
8 Mart, hear from the -- actually proceed whatever way
9 you'd like, but I think the best scenario here would be
10 to submit these professionals to live testimony and
11 cross-examination, especially -- I assume -- your
12 position is that you're competent, right?

13 THE DEFENDANT: Yeah, well, I would have to
14 ask that I was competent in this position but the court
15 would have to render a decision if I'm competent or if
16 I'm incompetent and that decision would have to be
17 forthcoming today.

18 THE COURT: No --

19 THE DEFENDANT: If you can't, then what I have
20 to do is I mainly have to have all my doctors be
21 subpoenaed in as well, Dr. Haile, Dr. Bernard, Rachel
22 Wenzel, psychotherapist Dr. Lavoie. That could be a
23 very costly situation. It could be very time consuming.
24 I think at this point I think a negotiation level could
25 come to maybe an agreement at this particular time about

1 this particular crime as a crime that is essentially
2 non-violent, and of course I do have a motion today
3 about the modification of the judge's detention hearing
4 which I've been held for 12 months, and of course being
5 competent is one thing but being incompetent is another.
6 Of course I did read Dr. Mart's opinion. He did state
7 that this man needs psychiatric counseling. There's
8 none where I am at the jail. This man needs medication.
9 There's none that's been given to me at this particular
10 time, and to put me back into that environment would be
11 a violation of the Fourth Amendment right under the
12 United States Constitution. I believe that's a due
13 process right. So I have a right to be released today
14 based on my opinion that I go back to my psychiatrist, I
15 go back to get the proper medication, at this point I
16 don't get any medications at all or do I have any
17 psychiatric counseling, judge, and I think that's a very
18 crucial issue that the court has to decide on today,
19 what's the best interest for Mr. Mahoney, per se, if
20 he's competent or incompetent, we have two different
21 opinions, but to really keep me incarcerated when I've
22 been in for 12 months when the charges, the evidence is
23 very weak at best and there's been new evidence that has
24 come forward. Judge, I think the very, very crucial
25 part about this, there wasn't a violation of federal law

1 which has to be violated in order for you to render an
2 opinion. You can't just say I'm going to make an
3 opinion on Mr. Mahoney when no violation of federal law
4 took place.

5 THE COURT: Well, the grand jury already
6 determined there's probable cause, so that's why you're
7 in court. A jury doesn't have to find you guilty before
8 I can address your competence.

9 THE DEFENDANT: But I'm also presumed innocent
10 until found guilty, but of course a prior investigator
11 has found witnesses that have, you know, substantially
12 come up with new evidence in the case that say, hey, Mr.
13 Mahoney never left the state of New Hampshire, and
14 that's factual. That's not allegations. And when you
15 have that type of determination, hey, the evidence is
16 weak, I should be released today and go back to my
17 doctor and go back to my medications, and of course like
18 I stated, you know, the court has to make that opinion
19 today because I'm being deprived of those liberty
20 issues.

21 THE COURT: I do want to address today the
22 conditions of your confinement, I do. Let's do this
23 first. Let's schedule a competency hearing. Does that
24 make sense to counsel?

25 MR. GARRITY: It does, judge.

1 MR. HUFTALEN: It does.

2 THE COURT: Is there anything -- so on the
3 issue of the need for or the propriety of a competency
4 hearing, does either side want to add anything to the
5 record one way or the other. Mr. Huftalen.

6 MR. HUFTALEN: The government concurs that a
7 competency hearing should be conducted. It will be the
8 government's position at that hearing, or the government
9 at that hearing will present the testimony of Dr. Kissin
10 from the Bureau of Prisons who examined the defendant,
11 and it was her opinion that he is competent. That will
12 be the opinion absent intervening circumstances that I'm
13 not aware of when she testifies before the court.

14 THE COURT: All right. Mr. Garrity, do you
15 have anything to add?

16 MR. GARRITY: Not really, judge. I guess at
17 that hearing I would call Dr. Mart, but what Mr. Mahoney
18 said reminds me that perhaps I may want to flesh that
19 out somewhat with some of the prior treatment providers
20 that Mr. Mahoney dealt with, especially the provider
21 that was the author of that report that was submitted to
22 you at the last hearing.

23 THE COURT: Yes. It may be that counsel for
24 both sides want some access to prior, his treating
25 physicians, and may wish to present evidence from or

1 through those physicians. I'll leave that to you,
2 though, to proceed as you wish.

3 All right, so we will schedule that. How much
4 time do you want or need for that hearing to prepare.
5 In other words, when should we schedule it?

6 MR. HUFTALEN: I would have to talk to Dr.
7 Kissin to get her schedule to find some dates that I
8 know she's available, and I would be happy to talk to
9 the deputy clerk to find time on the court's calendar.

10 MR. GARRITY: I would have to do the same with
11 Dr. Mart because I know he goes all over the place.

12 THE COURT: All right, I would only ask
13 counsel to proceed as expeditiously as possible so we
14 can get Mr. Mahoney's competency decided and get on with
15 this case one way or the other, and I know you'll work
16 with Charli to get that done.

17 MR. HUFTALEN: I'll try to do that tomorrow.

18 THE COURT: Now, in the meantime, I want to
19 talk about the medication that Mr. Mahoney is prescribed
20 and is receiving at the jail because while I'm not
21 likely to release him today, I do think he ought to get
22 the right meds that can put him in the best possible
23 frame of mind to participate in his defense. So let's
24 talk about that.

25 What's your position as to that, Mr. Garrity?

1 MR. GARRITY: Judge, I think Dr. Mart
2 references prior medication he was on, Xanax and
3 Seroquel.

4 THE COURT: Can you show me that in the
5 report?

6 MR. GARRITY: I think it's on the front page
7 there, he's referring to Dr. Kissin's report. I think
8 she said -- Dr. Mart refers to her report and says she
9 knows that he requested the medical staff start his
10 psychiatric medication.

11 THE COURT: Xanax and Seroquel.

12 MR. GARRITY: Right.

13 THE COURT: And it says that Mr. Mahoney was
14 apparently provided with Depakote, but he stopped taking
15 it after developing a rash.

16 MR. GARRITY: Right.

17 THE DEFENDANT: Allergic reaction, judge.

18 THE COURT: So, is it your position, Mr.
19 Garrity, that he ought to receive Xanax and Seroquel?

20 MR. GARRITY: Well, if Depakote is causing
21 this reaction of the rash and he's not taking it as a
22 result of that, I'm not a physician, so I can't be in a
23 position telling the court what is the appropriate
24 medication.

25 THE COURT: Of course.

1 MR. GARRITY: I would think based on both of
2 the psychiatrists, psychologists that looked at this
3 situation, that might be the best course of action to
4 have him take Seroquel and Xanax.

5 THE COURT: My understanding based on other
6 detainees at Strafford is that Seroquel is available at
7 Strafford. I don't know about Xanax. Is there anybody
8 from the marshals here who knows the answer to that
9 question?

10 DEPUTY MARSHAL: I can look into it.

11 THE COURT: I would like it because, you know,
12 I don't want it to be a situation where it's a stalemate
13 over, you know, stubbornness on one side or the other.
14 I mean, my experience with the U.S. Marshals is they
15 facilitate the best possible care, medical care of
16 inmates, but it needs to happen in this case like every
17 other case. And if Seroquel would be effective in
18 treating Mr. Mahoney's conditions, he ought to get it.

19 DEPUTY MARSHAL: Yes.

20 MR. HUFTALEN: Just before the hearing began I
21 received from the marshal's office 17 pages of medical
22 records that I had requested Strafford County produce.
23 I've given them to the deputy clerk and would ask that
24 the court maintain those under seal as a document in
25 this case. I didn't have the opportunity to make copies

1 to give to Mr. Garrity or to keep for myself, so I'd
2 like to be able to get a copy and obviously Mr. Garrity
3 needs a copy of that as well. I would point out to the
4 court the doctor who has seen Mr. Mahoney at Strafford
5 since June, the doctor had come back as a consultant
6 starting in June 2011, addressed the issue of Mr.
7 Mahoney's desire for Seroquel, and as I read the
8 doctor's notes he put him on Depakote instead because of
9 the potential for abuse with respect to Seroquel. I
10 have not had the opportunity to talk with the doctor or
11 to look into that further, but I'm happy to work with
12 the Marshal Service and Strafford County and address the
13 issue that you've raised.

14 THE COURT: So, Charli, let's docket those
15 sealed at level one until further order from the court
16 making sure that counsel for both parties get access to
17 that, and the U.S. Marshal Service -- I guess through
18 the U.S. Attorney the U.S. Marshal can see those
19 records.

20 MR. HUFTALEN: They're the ones who gave them
21 to me.

22 THE COURT: They gave them to you, so they
23 have them anyway. But I would ask that consideration be
24 given to Seroquel as a possible means of alleviating
25 some of Mr. Mahoney's symptoms.

1 MR. HUFTALEN: I would like to put something
2 else on the record, and not to be at all antagonistic,
3 but just so that we all have the same information that I
4 have, and I shared this with Mr. Garrity earlier. I had
5 requested that the Marshal Service inquire of Mr.
6 Mahoney's medication regimen and his compliance with it,
7 and the information that I received is as follows. That
8 Mr. Mahoney was prescribed a drug that is spelled
9 O-x-c-a-r-b-a-z-e-p-i-n-e, and that in July he was 68
10 percent compliant in taking that medication, in August
11 he was 24 percent compliant, and in September and
12 October he's been 0 percent compliant.

13 He was prescribed Trazodone,
14 T-r-a-z-o-d-o-n-e. In between the 27th of April and
15 November 7th Mr. Mahoney took this medication only four
16 times.

17 He was also prescribed Depakote which Mr.
18 Garrity referred to earlier, and that was discontinued
19 because of the apparent skin irritation or rash that
20 developed.

21 THE COURT: Mr. Garrity, do you want a minute
22 to talk to your client about what you just heard?

23 MR. GARRITY: Yes.

24 (Pause.)

25 MR. HUFTALEN: I should add, I neglected to

1 say the first two prescriptions were identified by the
2 Marshal Service and by Strafford County as being mood
3 stabilizers. And my understanding of Depakote is that
4 Depakote is one of many drugs that are not unusually
5 prescribed to address or to deal with bipolar which I
6 understand Seroquel is as well.

7 THE COURT: Yes. Mr. Garrity.

8 MR. GARRITY: Judge, just with respect to the
9 bipolar and Seroquel, I think Dr. Mart addressed that in
10 his report, the report that I submitted at the last
11 hearing, I think concluded that he was Bipolar 1, and
12 then some of my conversation with Dr. Mart he talked
13 about bipolar. So Seroquel, on that basis, I think
14 sounds like it would be the appropriate medication. And
15 Brian has related to me that he's been at Strafford on a
16 couple prior occasions in 2006 and '07 where they gave
17 him Seroquel and Xanax.

18 So if that's the appropriate medication and
19 they have it there, I don't know why they won't give it
20 to him.

21 THE COURT: Well, let's look into it.

22 THE DEFENDANT: If I may, your Honor, they had
23 given it to me in 2006 for ten months and I beat the
24 charge pro se that was a felony, and then in 2007 for
25 six more months they gave me Xanax and Seroquel, the

1 exact medication that I had been prescribed for seven
2 years. That's what makes it difficult when you're
3 talking to your attorney and relate information that you
4 have firsthand knowledge of, and that firsthand
5 knowledge is the doctor from Philadelphia, not the
6 consultant, said Mr. Mahoney should get Xanax and
7 Seroquel. For some unknown reason they stopped that,
8 and I have no problem, but that's where it becomes on a
9 modification of the magistrate's detention order. Okay?
10 If he's not going to get the prescribed medication, Mr.
11 Mahoney is going to fight, stated by the magistrate
12 judge, I think Judge McCafferty, danger to the
13 community, and new evidence came forward, I've
14 been with my counselor for seven years, I volunteer my
15 services and I'm an asset to the community. So, when we
16 get into those situations, especially when new evidence
17 has come forward, you as a judicial officer has the
18 right to, you may, you know, order, hear a detention
19 ordering you have a right to release me based on new
20 evidences, especially where the evidence for the
21 government is very weak. That's a very essential part
22 of that, your Honor.

23 THE COURT: Well, if your counsel files a
24 motion to modify --

25 THE DEFENDANT: I have, your Honor.

1 THE COURT: You can't file motions. You're
2 not pro se.

3 THE DEFENDANT: Well, I will ask that my
4 lawyer will file that.

5 THE COURT: Well, he's not going to file it,
6 he's going to look at it and he's going to -- look,
7 that's the way it works.

8 THE DEFENDANT: Yeah, I understand, but I
9 understand that that's the way it works, I should be
10 prescribed the medication if I'm going to be losing my
11 loss of liberty.

12 THE COURT: I think you heard me for the last
13 few minutes trying to address that issue, right?

14 THE DEFENDANT: That's fine.

15 THE COURT: I very seriously am. I think you
16 ought to get the meds that will put you in the best
17 frame of mind to proceed.

18 THE DEFENDANT: Absolutely. If not, I think
19 the modification of the magistrate's order in the weight
20 of the new evidence really is critical.

21 THE COURT: And if your counsel agrees that
22 it's in your best interest, he'll file it, all right?

23 Now, okay, what I'm going to ask you to do,
24 counsel, so they are going to be working on your meds
25 together to get to the right solution. If you need some

1 relief based on that, Mr. Garrity will request it from
2 the court and I'll do whatever is appropriate. When you
3 pick a date for this competency hearing, what I'm going
4 to want you to do, counsel, is five days before the
5 hearing I want you to file with me proposed findings of
6 fact and rulings of law that are derived from the
7 competency statute. And then, and Charli, five days
8 post findings and rulings, and the day before the
9 hearing, any time up till then a proposed order; all
10 right?

11 THE DEFENDANT: Judge, what about the
12 psychiatric counseling with both Dr. Kissin and Dr. Mart
13 that stated that this gentleman, that I should receive
14 at this time. By going to Strafford County again, I
15 will have no access to a psychiatrist whatsoever.

16 THE COURT: Is that true? At Strafford
17 County? Is there a facility where we detain, where the
18 court detains pretrial detainees where that type of
19 counseling is even offered? I don't even know the
20 answer to that.

21 THE DEFENDANT: I did recommend New Hampshire,
22 the Concord state hospital, judge, through my counsel.

23 THE COURT: Well --

24 THE DEFENDANT: I could also give me the
25 prescribed medication --

1 THE COURT: I view that, Attorney Garrity, as
2 part and parcel to the treatment he's getting for his
3 maladies, and if counseling is something that ought to
4 be happening along with a change in medication, and if
5 you can't get that arranged by consent working with the
6 U.S. Attorney and marshals, you should file a request
7 for relief.

8 MR. GARRITY: I will, judge.

9 THE COURT: But I certainly concur with doing
10 whatever we can within the confines of the system and
11 the resources to again best position Mr. Mahoney to
12 participate in his defense. All right, then?

13 I'll leave -- let's move as expeditiously as
14 we can and proceed toward a competency hearing and then
15 a trial.

16 All right, we are in recess. Mr. Mahoney, I
17 appreciate your effort here to be cooperative. I
18 appreciate that.

19 THE DEFENDANT: Oh, I am, your Honor, I think
20 it's an essential part of getting to the bottom of this.

21 THE COURT: Thank you.

22 (Court adjourned at 2:50 p.m.)

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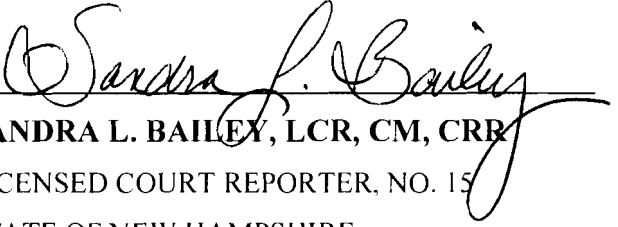
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C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

Submitted: 8/1/12


SANDRA L. BAILEY, LCR, CM, CRR
LICENSED COURT REPORTER, NO. 15
STATE OF NEW HAMPSHIRE